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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

Central States, Southeast and Southwest Areas Pension Fund moves the Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari of petitioner Board of Trustees, Bay Area Laundry and Dry Cleaning Pension Trust Fund. Central States urges that the United States Court of Appeals for the Ninth Circuit be reversed. The reasons for ths motion are as follows:

1. Central States Pension Fund is the largest multiemployer defined benefit pension plan in the coun-

try. The Pension Fund covers approximately 400,000 active participants and retirees.

2. Central States is governed by the Employee Retirement Income Security Act of 1974, as amended, including its statute of limitations for collection of withdrawal liability found at 29 U.S.C. § 1451(f).

3. The Central States is located within the jurisdiction of the Seventh Circuit, but does business in and is subject to litigation in each of the numbered federal judicial circuits.

4. The decision of the court below interprets the limitations period of § 1451(f) in a manner in conflict with the interpretation of the Seventh Circuit (and other circuits in which Central States does business).

5. The nationwide scope of Central States' operations makes it uniquely suited to address the effect of the conflict among the circuits on the operations of multiemployer pension plans like Central States and Petitioner.

6. Petitioner consents to the filing of this brief. Respondents refuse to consent.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

INTRODUCTION

Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters and various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947. Central States is governed by a board of trustees consisting of an equal number of union and management appointees (four of each). Central States is administered for the exclusive benefit of the participants to whom the trustees owe an

undivided duty of loyalty. The purpose of the Central States pension plan is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the plan.

Under the plan participating employers contribute to Central States pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. Employees earn credit (accrued benefits) for covered work periods and after earning 10 years of credit, become vested in the benefits. The plan covers 178,000 retirees currently drawing benefits, 217,000 active participants and 69,000 vested inactive participants.

Central States is the largest multiemployer pension plan in the United States with assets of $14.473 billion and vested benefit liabiliies of $16.524 billion. Central States' unfunded vested benefits ("UVB") are thus $2.051 billion. The UVB is not immediately due because the liabilities represent the present value of benefits payable over decades into the future. The expected time to amortize the UVB at current funding rates is about 29 years. The principal means for funding the UVB, as well as for funding current benefit accruals, is the contributions of employers made pursuant to their collective bargaining agreements. Central States presently receives contributions from over 5,000 employers through over 9,000 billing accounts from 42 states and Canada.[1]

Additional funding is required by statute when an employer withdraws (ceases to have an obligation to contribute) from Central States. 29 U.S.C. § 1381(a). This withdrawal liability is an employer's pro-rata share of the UVB. 29 U.S.C. § 1391. Withdrawal liability is payable in installments with interest. 29 U.S.C. § 1399(c)(1). *See* generally Subtitle E of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29

[1] A billing account is generally assigned to each collective bargaining agreement. Some employers are subject to more than one agreement.

U.S.C. § 1381, *et seq*; *Milwaukee Brewery Workers v. Jos. Schlitz Brewing Co.*, —— U.S. ——, 115 S.Ct. 994 (1995). As of September 30, 1996, Central States had 305 outstanding assessments of withdrawal liability totalling approximately $267 million. Of these 80 occurred in 1996 in the total amount of $35 million. Since September 26, 1980,[2] Central States has collected about $440 million in withdrawal liability.

Central States' withdrawal liability program, other than its size, is similar to Petitioner's Bay Area Laundry and Dry Cleaning Pension Trust Fund. Due to its size, however, Central States brings a somewhat broader perspective to consideration of certain issues such as that presented in the Petition. Central States files this brief *amicus curiae* in support of Petitioner.

INTERESTS OF CENTRAL STATES

In the decision below the United States Court of Appeals for the Ninth Circuit ruled that the six-year statute of limitations for bringing an action to collect withdrawal liability begins to run on the date that an employer withdraws from a multiemployer pension plan. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corporation, et al.*, 73 F.3d 971 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3185 (U.S. Sept 10, 1996) (No. 96-370). This decision is directly in conflict with four earlier decisions of the United States Courts of Appeals for the First, Third, Seventh, and District of Columbia Circuits in *Giroux Bros. Transp. v. New England Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1 (1st Cir. 1996); *Board of Trustees of Dist. 15 Machinists Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994); *Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167

[2] This is the effective date of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which added the withdrawal liability provisions of ERISA.

(7th Cir. 1993); *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir. 1989). These other circuits have each ruled that the statute of limitations does not commence running until the latest date on which the cause of action accrues—not when the employer withdraws, but when the employer fails to make a payment pursuant to the pension plan's demand.

This conflict among the circuits creates a problem of immense proportions for multiemployer plans like Central States that cover operations in more than one federal judicial circuit. Which law applies to a withdrawal from Central States? Because of ERISA's broad venue provisions it might be the law of the circuit where the plan is administered or where the employer resides or does business. 29 U.S.C. § 1451(d). While Central States is administered in Rosemont, Illinois, within the Seventh Circuit, only 30% of its billing accounts are in the Seventh Circuit. Central States has actual or potential withdrawal liability claims in 42 states and in each of the eleven numbered judicial circuits. The following table illustrates the breadth of Central States' contributing employer base.

Circuit	Billing Accounts	Percent of Total
1	12	0.1
2	63	0.7
3	170	1.9
4	293	3.2
5	116	1.3
6	2.944	32.1
7	2,781	30.3
8	1,961	21.4
9	228	2.5
10	409	4.5
11	180	2.0
	9,157	100.0%

Nor does the location of the billing account resolve the dilemma on a case by case basis. Many contributing employers conduct operations across state and judicial boundaries. Each of the five largest contributors to Central States does business in virtually every judicial circuit as their number of billing accounts suggest:

Company	Billing Accounts
ABF Freight System, Inc.	132
Consolidated Freightways	173
Roadway Express	182
United Parcel Service (UPS)	101
Yellow Freight Systems, Inc.	150

UPS, for example, does business in every state and has billing accounts in 22 states located in seven federal judicial circuits. Thus, whether an action for collection of withdrawal liability is timely often cannot be known until after commencement of litigation in a particular jurisdiction. Until that time, there will generally be at least two different limitations periods that might be applied.

In sum, the administrative and legal problems created by the conflict among the circuits has, no doubt, an even greater impact on Central States than on Petitioner. Many of the other 2,000 multiemployer pension plans (particularly those located outside the Ninth Circuit) will also experience these problems to one degree or another. Central States, thus, serves as an apt example of why this conflict must be resolved immediately by granting the petition for a writ of certiorari.

ARGUMENT

I. THE STATUTE OF LIMITATIONS FOR BRINGING AN ACTION TO COLLECT WITHDRAWAL LIABILITY HAS BEEN GIVEN CONFLICTING INTERPRETATIONS BY THE FIRST, THIRD, SEVENTH, AND DISTRICT OF COLUMBIA CIRCUITS FROM THAT IN THE COURT BELOW.

Under ERISA a complete withdrawal occurs when a contributing employer permanently ceases to have an obligation to contribute under the plan, or permanently ceases all covered operations under the plan. 29 U.S.C. § 1383(a). The date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations. 29 U.S.C. § 1383(e). Upon the withdrawal of an employer, the plan must notify the employer of the amount of any withdrawal, provide the schedule of payments required of the employer, and collect the withdrawal liability. 29 U.S.C. §§ 1382 and 1399(b)(1). The statute of limitations for bringing an action to collect withdrawal liability is found in 29 U.S.C. § 1451(f):

> (f) An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; . . . .

The court below ruled that "for actions to recover withdrawal liability incurred as a result of a complete withdrawal, . . . the limitations period begins to run from the date that the conditions for withdrawal are met. . . . In other words, the limitations period begins to run from the date of complete withdrawal. . . ." *Bay Area Laundry v. Ferbar Corp.*, 73 F.3d 971, 973 (9th Cir. 1995). The

court's ruling was compelled by its earlier ruling in *Board of Trustees of Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), and was acknowledged to be in conflict with *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir. 1989). See 73 F.3d at 973 (Trott, J. concurring). While the withdrawal at issue in *Thibodo* arose under a different provision of the statute (29 U.S.C. § 1383(b)), the court saw no ground to distinguish it from the instant withdrawal under 29 U.S.C. § 1383(a). *Id.* The question presented is when does the cause of action arise—the date of withdrawal, as held by the court below, or some later date, as held by the other courts of appeals?

The first of the other courts of appeals to face this question was the District of Columbia Circuit in *Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir. 1989). In that case, the district court had ruled, as did the court below, that the six year limitations period ran from the date of the employer's complete withdrawal. 871 F.2d at 1121. The District of Columbia Circuit reversed. That court looked to 29 U.S.C. § 1451(a), which defines a cause of action in terms of whether a party is "adversely affected by the act or omission of any party . . . with respect to a multiemployer plan." The court held that a plan is adversely affected (and thus, a cause of action arises) when the plan has not received payments which are due and owing. *Id.* at 1122. That can only happen after the date of withdrawal when, having received a demand for payment from the plan, the employer fails to make a scheduled payment when due. Indeed, the court noted that the "language of the statute . . . points firmly in the direction of the conclusion that Sandoz's uncured failure to pay the sum demanded adversely affected the plan, thus giving rise to a cause of action." *Id.*[3]

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[3] In other words, a simple missed payment under § 1399(c)(1) may not be the latest date on which the statute of limitations begins to run. Under § 1399(c)(5) an employer has 60 days to cure a

The Seventh Circuit next addressed the question in *Central States Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993). There the court held that "the claim accrues as soon as payment becomes overdue." *Id.* at 172. Moreover, the court concluded that "the whole sum becomes due, and the whole claim accrues, when the first payment's missed." *Id.* Thus, where the employer misses a series of payments, the six year statute of limitations runs from the first missed payment, rather than there being a separate limitations period commencing with each missed payment. Since the first missed payment will always be later than the date of withdrawal, the Seventh Circuit decision conflicts with the decision below.[4]

The Third Circuit has also adopted a rule that the statute of limitations runs from the employer's missed payment, not the date of withdrawal. *Machinists Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3rd Cir. 1994). Unlike the *Navco* court, however, the Third Circuit held that absent an acceleration of the withdrawal liability payment schedule by the plan, the six year statute of limitations runs separately against each missed payment. *Id.* at 861. The Third Circuit is thus in conflict with both the court below and the Seventh Circuit. The Third Circuit would apparently agree with the District of Columbia Circuit in *Clyde Sandoz*. *Id.* at 860.[5]

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missed payment following a notice from the plan. A cause of action for a statutory "default" arises on that latter day from which, we presume, a new limitations period begins to run.

[4] The Seventh Circuit conflicts with the District of Columbia Circuit, as well. The District of Columbia Circuit would count six years from the end of the 60-day cure period of § 1399(c)(5) while the Seventh Circuit would count from the first missed payment notwithstanding the cure period.

[5] It is not clear, however, whether the Third Circuit would agree that if the plan accelerates the amount due, the statute runs from the end of the 60-day cure period of 29 U.S.C. § 1399(c)(5)), as suggested by the District of Columbia Circuit. And no court has addressed whether upon acceleration a new 6-year statute of limitations commences for the entire withdrawal liability amount or whether the amounts due prior to the acceleration have separate limitations periods commencing on their individual due dates with only the balance of the payment schedule subject to the new limitations period.

The First Circuit's decision in *Giroux Bros. Transp. v. New England Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1 (1st Cir. 1996) also conflicts with the decision below. The First Circuit held that the timeliness of a plan sponsor's demand is governed exclusively by § 1399(b)(1). That provision requires that a plan's demand for withdrawal be made "as soon as practicable" after the employer's withdrawal. In *Giroux*, twelve years had passed after the date of withdrawal before the plan demanded payment. The employer had been making contributions, however, even though its collective bargaining agreement had expired and it was not entitled to contribute. When this error was discovered by the plan, it demanded withdrawal liability. While the court did not have occasion to rule whether this demand was made as soon as practicable, it did make clear that six years from the date of withdrawal would not be an appropriate limitations period. The court below, by contrast, would have ruled the plan's claim barred by the six year statute of limitations of § 1451(f).

In sum, at lease five courts of appeals are in complete disarray on the question presented. There is a clear conflict between the decision below and each of the decisions of the First, Third, Seventh, and District of Columbia Circuits. There is also a clear conflict between the decisions of the Third and Seventh Circuit. Finally, there may be a conflict between the decisions of the District of Columbia Circuit and the Seventh Circuit. This Court should grant the writ of certiorari to resolve these conflicts.

II. THE CONFLICTING DECISIONS OF THE COURTS OF APPEALS PLACE AN UNACCEPTABLE BURDEN ON PENSION PLANS, CONTRIBUTING EMPLOYERS, AND THE COURTS AND SUBVERT STATUTORY PURPOSE.

The conflict in the Circuits places multiemployer plans like Petitioner and Central States in an untenable position. The following example will illustrate:

> Assume that an employer withdraws on June 1, 1986; the plan demands payment in monthly installments over a 20-year payment schedule with the first payment due on September 1, 1986; the employer misses the first payment, but thereafter makes timely monthly payments through September 1, 1992, when it ceases all further payments; the plan sends a notice of default and acceleration on October 1, 1992; the plan sues for collection on December 1, 1992.

Under the Ninth Circuit's interpretation, the statute of limitations would begin to run on June 1, 1986, when the employer withdrew. Thus, the limitations period would expire on June 1, 1992, six years later, and the plan's December 1, 1992 action would be untimely. Of course, the plan could have sued immediately on the first missed payment and under our example, that action would be timely. But, then, what if the employer made every payment when due through the sixth anniversary date of the withdrawal, and then ceased paying?[6] Or what if a labor dispute continued for six years after contributions

[6] The court suggests at note 4 that an employer might form a contract for installment payments resulting in a different limitations period. Actually installment payments are required by the statute and entail no contract. The only choice by the employer is whether to pre-pay the installment as it is entitled to do under 29 U.S.C. § 1399(c)(4). The court was on the right track, however, and if it had stayed there, it would have reached the Third Circuit's view that the statutory payment schedule be treated like an installment contract with a separate limitations period for each missed payment.

ceased?[7] In either case the plan may not sue (and in the latter case it is barred from even issuing an assessment) until after the sixth anniversary of the withdrawal, and thus the plan would be out of time to sue.

Under the Seventh Circuit's interpretation, the statute of limitations would begin to run on September 1, 1986, when the employer first missed a payment. Thus, the limitations period would expire on September 1, 1992, six years later, and the plan's action would be untimely. Under the Seventh Circuit's view, the plan forgives a missed payment at its peril. If the plan does not sue on that first missed payment, the employer would be entitled to cease further payments on the sixth anniversary of its first missed payment.

Under the Third Circuit's interpretation, the statute of limitations would begin to run on September 1, 1986, only for that missed payment, and would expire on September 1, 1992, only as to that payment. A separate limitations period would begin to run when the liability is accelerated —either October 1, 1992, when the notice is issued, or maybe on November 30, 1992, which is the last day of the 60-day period allowed the employer to cure the default. The plan's action would be untimely as to the first missed payment since the limitation period for that one expired on September 1, 1992. The action would be timely for the balance of the withdrawal liability since that limitation period would not expire until October 1, 1998.[8]

[7] Under § 1398(2) a withdrawal does not occur while contributions are suspended during a labor dispute. If, as is often the case, a suspension is later deemed permanent, the withdrawal date relates back to the cessation of contributions (§ 1383(e)), which may be more than six years ago.

[8] The Third Circuit's decision is susceptible to other interpretations. When the plan accelerates the claim, does that new date supplant the original date entirely thus reviving the plan's claim for the first missed payment? (This would conform to the District of Columbia Circuit's view.) Or does it collapse the limitations

Under the District of Columbia Circuit's interpretation, the statute of limitations would begin to run on November 30, 1992, which is the last day of the 60-day cure period following the plan's default notice. The plan's action the next day would be timely for the entire withdrawal assessment because the limitations period on the entire claim would not expire until November 30, 1998.

As this example shows, a plan cannot be sure when its claim for withdrawal liability against a withdrawn employer will become barred by the statute of limitations—at least until litigation is initiated in a court with a particular rule. Nor is it enough for a plan to simply count time from the earliest possible date, the date of withdrawal, as required by the court below. As we have shown, that solution will not work in many cases and would be susceptible to manipulation by withdrawn employers. The decision below is clearly wrong but that does not fully resolve the question. Does the statute run from the first missed payment (Seventh Circuit), the end of the 60-day cure period following a notice of default (District of Columbia Circuit), or from each missed payment when the plan does not exercise its default option (Third Circuit). Uniform (and effective) administration of the statute requires resolution of these conflicts as early as possible. This Court should grant the petition for a writ of certiorari.

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periods on all installments to the original missed payment making the entire claim untimely under this example? (This would conform to the Seventh Circuit's view.)

CONCLUSION

For these reasons the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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